91 994

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

V.

RENEE J. WELCH

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ROBERT E. COLVILLE
District Attorney

KEMAL ALEXANDER MERIÇLI
Assistant District Attorney

JAMES R. GILMORE
Assistant District Attorney
Counsel of Record

OFFICE OF THE DISTRICT ATTORNEY
401 Allegheny County Courthouse
Pittsburgh, PA 15219
(412) 355-4377

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether Superior Court of Pennsylvania erred in holding that testimony specifically relating the fact that defendant/Renee Welch had openly and expressly refused her stepfather's request to allow the police to search her room in the family home for evidence of illicit drugs was inadmissible on the grounds that it comprised an improper comment on her invocation of her rights under the Fourth Amendment to the United States Constitution?

Answered in the negative below.

II. Whether, alternatively, Superior Court erred in failing to consider that the admission of testimony specifically relating the fact that Renee Welch had openly and expressly refused her stepfather's request to allow the police to search her room in the family home for evidence of illicit drugs was harmless error?

Not answered below.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF CITATIONS

PAGE(S)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

OPINIONS BELOW

The September 16, 1991 Order of the Supreme Court of Pennsylvania denying petitioner's petition for allowance of appeal, a copy of which is set forth at Appendix "A", is as yet unreported. The January 23, 1991 Opinion of the Superior Court of Pennsylvania with one concurrence in the result, which is set forth at Appendix "B", is published at 401 Pa. Super. 393, 585 A.2d 517 (1991); *see* 48 CrL 1433 (1991). The January 10, 1990 Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, is set forth at Appendix "C", and is an unpublished slip opinion.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on September 16, 1991, and this petition was filed within ninety (90) days of that date in compliance with Rule 13.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent, Renee Welch a/k/a Allyson Renee Welch, was charged by criminal information filed on September 3, 1988, at No. CC 8810301A, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with two

(2) counts of possession with intent to deliver a controlled substance (heroin and cocaine), 35 Pa.C.S. §780-113(a)(30), two (2) counts of possession of controlled substance, 35 Pa.C.S. §780-113(a)(16), one (1) count of possession of drug paraphernalia, 35 Pa.C.S. §780-113(a)(32), and one (1) count of corruption of minor, 18 Pa.C.S. §6301.

On February 15, 1989, respondent's jury trial before the Honorable Donna Joe McDaniel commenced and respondent was found guilty of all charges on February 17, 1989.

After disposition of post-trial motions, respondent was sentenced on June 22, 1989, to a term of imprisonment of five and one-half (5½) to eleven (11) years, plus a $5,000 fine, for her count one conviction of

possession with intent to deliver, a consecutive term of imprisonment of one (1) to three (3) years, plus a $5,000 fine, for her count two conviction of possession with intent to deliver, and a consecutive term of imprisonment of two and one-half (2½) to five (5) years (to be served consecutive to the sentence imposed at count two), for respondent's count six conviction of corruption of minors. Accordingly, respondent's aggregate term of imprisonment is nine (9) to nineteen (19) years, with a total of $10,000 in fines, plus court costs.

Respondent's appeal to the Superior Court of Pennsylvania resulted in the Order and Opinion of January 23, 1991, vacating judgment of sentence and remanding for new trial. *Commonwealth v. Welch*, 401 Pa. Super. 393, 585 A.2d 517

(1991); *see* 48 CrL 1433 (1991). During the trial a police officer related how respondent refused to allow police to search her room without a warrant when respondent's stepfather asked respondent to allow a search. The Superior Court panel held that respondent's refusal to allow a search of her room was an assertion of her constitutional right to be free from search under the Fourth Amendment of the United States Constitution and that her asserting the right should not be used against her as evidence suggesting guilt. The Superior Court found the testimony regarding respondent's refusal to search in the absence of a warrant inadmissible and reversible error. The Superior Court's conclusion was predicated on its application of an analogy to the

invocation of one's right to silence under the Fifth Amendment of the United States Constitution and its belief that just like assertion of the Fifth Amendment right cannot be used against a person, neither should assertion of a Fourth Amendment right be treated differently. The court premised this ruling on its belief that a refusal to search can be construed as evidence that someone is hiding something to a degree that indicates guilty conscience. *See* Appendix B.

The Commonwealth sought and was denied by Order of September 16, 1991, review by the Supreme Court of Pennsylvania of the reversal and remand for new trial. This petition followed.

B. Concise Statement of the Facts

The factual circumstances underlying the criminal convictions are briefly as follows. On September 2, 1988, Pittsburgh Police received a radio message at approximately 8:00 p.m. to investigate a complaint about a woman named Renee Welch selling drugs outside a residence at 1421 Chicago Street. The officers went to the residence and seeing no one outside knocked on the door and were greeted by respondent's mother and stepfather. The officers were invited into the home after the parents learned that they were there investigating a report concerning respondent.

The mother and stepfather were adamant about discovering the basis of the report and the police, after contacting their station, informed them

that Kevin Welch, respondent's brother, was the complainant who had made the report. Respondent's brother was called downstairs. At first he denied making the call, but later admitted it and went on to describe facts implicating respondent in drug selling activity, telling his parents and police that he reported her activities because he was afraid for the safety of the family from junkies appearing at the house.

Respondent was then called downstairs by her stepfather and confronted with the allegations, which she denied. At that time, *the stepfather* suggested that respondent permit inspection of her room to disprove any allegations of wrongdoing, but respondent refused to consent to a search without a search warrant (N.T. 2/14-17/89, pp. 86-

88, 273-276). *See also* (Appendix C, p. 22a, 25a-26a; Slip Op. McDaniel, J., 1/10/90, p. 2, 4; finding it was the stepfather who initiated the request to search). The police then told respondent not to return to her room while they obtained a warrant and they began advising the parents.

Testimony indicates that respondent's nephew, Francisco Martinez, age 10, conversed with respondent and then went upstairs. The nephew was then chased downstairs with respondent's brother at his heels and yelling that the nephew had the drugs. One of the officers intercepted the boy with a bear hug and balloons of suspected narcotics began falling to the floor from the nephew, who became hysterical crying,

"Renee [respondent] is going to kill me. I screwed up."

In response to finding the balloons, respondent's mother told the young boy to show the police where he had gotten the drugs and he took one of the officers to respondent's room upstairs. Respondent was then arrested and a search warrant was obtained and additional evidence was seized. A Commonwealth expert testified that the amount of drugs found, 2.377 grams of heroin and 2.869 grams of cocaine, plus the packaging and bus and plane tickets all were indicia consistent with the sale of drugs.

REASONS FOR GRANTING THE WRIT

I. SUPERIOR COURT OF PENNSYLVANIA ERRED IN HOLDING THAT TESTIMONY SPECIFICALLY RELATING THE FACT THAT RENEE WELCH HAD OPENLY AND EXPRESSLY REFUSED HER STEPFATHER'S REQUEST TO ALLOW POLICE TO SEARCH HER ROOM IN THE FAMILY HOME FOR EVIDENCE OF ILLICIT DRUGS WAS INADMISSIBLE ON THE GROUNDS THAT IT COMPRISED AN IMPROPER COMMENT ON HER INVOCATION OF HER RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The protections afforded the Fifth Amendment have not been extended by this Court to require that the assertion of the right to refuse a search under the Fourth Amendment cannot be referred to at trial or that such a referral is an infringement on Fourth Amendment rights. Here, the Superior Court of Pennsylvania erroneously held, by analogy to the Fifth Amendment, that admission of testimony

concerning respondent's refusal to allow a search of her room was prohibited under the Fourth Amendment, because of its belief that the Fourth Amendment protects, in addition to the actual search, a refusal to search, which the court felt can be construed as evidence of guilty conscience. Just as this Court has never required that warnings need be given prior to the exercise of a person's rights under the Fourth Amendment, neither has this Court mandated that assertion of those rights need be shrouded in secrecy.

During the course of her testimony, Officer Kathryn Degler related how respondent refused to allow police to search her room without a warrant when respondent's stepfather asked respondent

to allow a search (N.T. 2/14-17/89, pp. 85-89). As a preliminary matter, the Commonwealth respectfully submits that because the request to search was put forth by a private individual, the stepfather, Fourth Amendment prohibitions against unreasonable searches and seizures are inapplicable here. The Fourth Amendment, "proscrib[es] only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1985); *Commonwealth v. Dembo*, 451 Pa. 1, 301 A.2d 689 (1973). This was a request by

a private individual to have the respondent subject herself to a search of her room by the police.[1] The police did

---

[1] Superior Court ignored this lack of police action involving respondent's refusal to search by stating, "it was suggested by someone that if the allegations were false then she [respondent] ought to allow the police to inspect her room." (App. "B", p. 5a; 585 A.2d at 518). This innocuous reference to "someone" misstates the record which clearly shows it was respondent's stepfather, Mr. Rollerfellow, that initiated the request to search (N.T. 2/14-17/89, pp. 85-89, 273, 276). Judge McDaniel clearly found it was the stepfather, a third party, not the police, which made the request (App. "C", 22a, 25a-26a; Slip Op. at 2, 4). Further, respondent's brief before Superior Court openly acknowledged "Mr. Rollerfellow had said to [respondent] at the time, 'if you have nothing to hide, why not let the police look through your room?'." *See* Brief for Appellant at 51. Regardless that Superior Court declined to state it was respondent's stepfather which made the request, it is evident from a plain reading of its Opinion even Superior Court was aware it was not the police when it referred to "someone." Therefore, Superior

not initiate the request by the stepfather, who of his own accord made the request of the respondent. The police did not, therefore, initiate governmental action that is within the meaning of the Fourth Amendment. The grounds for reversal by the Pennsylvania Superior Court rely on what it found to be a violation of the Fourth Amendment when a private individual, without police intervention or solicitation, requested the respondent to consent to a search of her room.

At the time of the stepfather's request, the motivation behind the stepfather's actions was his own desire to facilitate the inquiry into the accusation of drug activity made by

---

Court's holding and respondent's claim to Fourth Amendment protection under the circumstances is ill-founded.

respondent's brother and was not in response to a request by police to initiate a search at that time. However, the stepfather's personal motive in this matter is insignificant, because any rule in this case ought to be grounded on the facts that actually occurred. Regardless of what his motives might have been, plainly he was not acting on behalf of the police or government. The red herring is that the end result is a police search. That does not really matter as long as there is no dispute or way to characterize the stepfather's request to respondent to permit a search as police action. Here, the record clearly shows that the request to search was an invention of the stepfather's own desire to get to the bottom of the matter. All that matters is that he made

the request of his own accord, not the police. Moreover, not only was the request to search here made by a private individual, but it was made by an adult parent in his own home, where he was entitled to search himself or even give his consent to search to the police should he choose.

Despite the ill-founded application of the Fourth Amendment by the Pennsylvania courts, the Commonwealth respectfully submits this Court has never required transformation of the right to privacy to a prohibition of evidentiary use of the exercise of the right. The right to refuse entry is equally available to the innocent as well as the guilty. In the Fourth Amendment context, the law has always centered on excluding evidence from a search determined to be

illegal and has made no move to make warnings such as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), for Fifth Amendment purposes extend to other constitutional rights. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), this Supreme Court stated that requiring police advise a person of his right to refuse to consent to a search:

> [I]s a suggestion that has been almost universally repudiated by both federal and state courts, and we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a

logical extension of investigative police questioning.

The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. *Cf. Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274. And, while surely a closer question, these situations are still immeasurably, far removed from 'custodial interrogation' where, in *Miranda v. Arizona, supra,* we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical

consent search, we refused to extend the need for warnings:

> 'Our decision is not intended to hamper the traditional function of police officers in investigating crime... When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.' 384 U.S., at 477-478, 86 S.Ct., at 1629-1630.

Id. at 231-232, 93 S.Ct. at 2049-2050, 36 L.Ed.2d at 865-866. As a corollary to the foregoing principle in *Schneckloth v. Bustamonte*, this Court has authoritatively held that the question of whether or not a "seizure" implicating

the Fourth Amendment has occurred is not affected by the fact that the police did not expressly tell the individual to whom questions are addressed that he is not free to respond.[2] *I.N.S. v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 1762-1763, 80 L.Ed.2d 247, 255 (1984)("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."); *United States v. Mendenhall,* 466 U.S. 544, 555, 100 S.Ct. 1870, 1878, 64

---

[2] This Court has deliberately extrapolated this specific principle from the general holding of *Schneckloth v. Bustamonte,* that the voluntariness of a suspect's consent to search is not affected by the failure of the police to tell that he has a right to refuse.

L.Ed.2d 497 (1980)("Our conclusion that no seizure occurred is not affected by the fact that respondent was not expressly told that she was free to decline to cooperate with the inquiry, for the voluntariness of her responses does not depend on her having been so informed."). If the law is as stated by the Pennsylvania courts in the case of Renee Welch, then *Schneckloth v. Bustamonte,* has been reversed and is no longer the law of the land.

Moreover, this Court's holdings in *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which applied the Fifth Amendment to protect a criminal defendant from having his silence used against him and

the use of silence as evidence of guilt, do not apply to the Fourth Amendment right to be free from unreasonable searches, because the refusal to consent to a search could be upon privacy grounds, rather than fear of incrimination.

Here, the police properly investigated a complainant's report of criminal activity by going to the location and were given voluntary admittance into the home by the homeowners, who cooperated with their investigation. The subsequent consensual search was instituted at respondent's mother's request, a homeowner, and probable cause for the valid search warrant existed. Because the searches were legal, with either consent or probable cause, respondent's Fourth

Amendment rights were not infringed. *Cf. Illinois v. Rodriguez*, ___ U.S. ___, 110 S.Ct. 2793, ___ L.Ed.2d ___ (1990). Respondent's actual refusal to permit a search had no bearing on the legal searches that eventually took place and no recognized infringement on respondent's Fourth Amendment rights transpired.

There is an essential distinction between the Fifth and Fourth Amendments. The Fifth Amendment protects the right to silence and the courts have held that by its very nature, the right requires that a person's invocation of this right should not be used against them, because of the adverse inference of guilt through the person's own action such use would invoke. Use or comment on

a person's silence would in effect make his right to silence meaningless. However, the Fourth Amendment's right to not be subjected to "unreasonable" searches and seizures indicates the qualitative, subjective nature of the right, that has been held not to require a warning. While each protects a separate interest, the Fifth Amendment is absolute whereas the Fourth Amendment is qualitative, meaning a person does not always have a right not to be searched -- i.e., when probable cause arises or, as here, when consent is given by a person with authority -- but in contrast always has the right to remain silent. For this reason the Commonwealth believes the action of the Pennsylvania courts in "developing" the law on Fourth Amendment

rights by its holding in this case is erroneous and inappropriately embraces and applies concepts of Fifth Amendment law to the distinctly different situation of search and seizure law. The Pennsylvania courts have gone beyond the United States Supreme Court in applying requirements to a valid search request -- here, most noticeably by a third party -- that have heretofore been only applied to the Fifth Amendment.

In addition to the officer's testimony regarding the refusal to search, the respondent herself was cross-examined on her refusal. In the recent decision of *United States v. McNatt,* 931 F.2d 251, 256-258 (4th Cir. 1991), the Fourth Circuit Court of Appeals found a prosecutor's comment to a jury regarding

a defendant's refusal to consent to a search of his truck was not a violation of the Fourth Amendment, because the comment regarding the defendant's assertion of his rights did not affect his freedom from unreasonable searches:

> Under the fifth amendment, a suspect has the right to remain silent at all times and may not be required to say anything at the time of his arrest, during confinement or at trial. However, under the fourth amendment, a person may not prevent a search of his person or his property. By withholding permission to search, he merely puts the government to the procedural test of proving probable cause to obtain a search warrant.

Id., 931 F.2d at 257. The Fourth Circuit specifically found that the exercise of the defendant's right to refuse permission to search without a warrant could be used against him when the

defendant opened the door by accusing the arresting officer of planting the drugs in his truck. In the present case, respondent took the stand and interjected her defense that she did not have any knowledge of the presence of drugs in her room at the time of the officers' investigation and prior to the police discovering the drugs, and she even implied that her brother had planted the drugs there (N.T. 2/14-17/89, pp. 256-259). Thus, the subsequent questioning by the prosecutor on cross-examination concerning respondent's refusal to search (*Id.*, at 273-276), was relevant, as in *McNatt*, to discredit respondent's claim.

In addition to *Schneckloth v. Bustamonte* and its progeny, the Pennsylvania courts have offended this Court's holding in *South Dakota v.*

Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). In *Neville*, this Court found that a motor vehicle operator's refusal to submit to a blood-alcohol test, after a police officer has lawfully requested it, regardless of the form of the refusal, was not a "compelled" or coerced act within the meaning of the Fifth Amendment because the State gave the defendant the choice of submitting to the test or refusing, and, therefore, the refusal could be used against the defendant at trial. *Id.*, 459 U.S. at 561-564, 103 S.Ct. at 921-923. *Neville* found that since the offer to take the blood-alcohol test was a legitimate request under the law, the fact that the suspect or defendant is given an option to refuse the test does not make the State's action "*less*"

legitimate. *Id.*, 459 U.S. at 563, 103 S.Ct. 922. In addition, *Neville* found use of the refusal did not violate the due process clause because it was not fundamentally unfair for the State to use the refusal to take the test as evidence of guilt, even though the suspect was not specifically warned that his refusal could be used against him at trial. *Id.*, 459 U.S. at 565, 103 S.Ct. 923.

Here, respondent was simply asked by her stepfather to permit a search and she was not compelled at any time to submit to a search. The request by the stepfather was legitimate and even the police could have made such a legitimate request should they have chosen to do so. *See Rodriguez, supra.* Further, as in *Neville,* the police would not have had to warn respondent

concerning what use could be made of her refusal to search. *Neville*'s finding that the Fifth Amendment did not act to prevent use of the refusal due to a lack of coercion is directly analogous to the present use of a refusal to search under the Fourth Amendment and demonstrates the error of the Pennsylvania courts' mistaken reliance on Fifth Amendment law. Simply put, if it doesn't violate the Fifth Amendment to introduce evidence of a motorist's refusal to submit to a blood test, it makes no sense to think that it violates the Fourth Amendment to introduce evidence that an individual refused to consent to the search of her home. Such evidence should not be inadmissible either in the second set of circumstances. Yet, illogically this is

the very ruling of the Pennsylvania appellate courts in this case.

The Commonwealth would note that the Pennsylvania courts' position is not without some support in other jurisdictions and would point to the Ninth Circuit Court of Appeals case of *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), which has made a similar analogy in finding evidence of a refusal to permit a search made to a law enforcement officer should not be admissible because it would unduly penalize invocation of Fourth Amendment rights, and which has been used by a few jurisdictions along this line. *See Garcia v. State*, 103 N.M. 713, 712 P.2d 1375 (1986); *Padgett v. State*, 590 P.2d 432 (Alaska 1979). Each of these cases is distinguishable from the instant

because of the involvement of police action. Moreover, disallowing the use of a refusal to search by relating that right to the right to remain silent allows for unnecessary hampering of legitimate police investigatory techniques in the form of consensual searches, muddying the waters, and possibly allowing a stepping stone to broadening the application of the Fourth Amendment's proscriptions against unreasonable searches to areas not intended. If the refusal to search is itself protected under the Fourth Amendment, a reasonable corollary to the Pennsylvania courts' holding today would be to invoke requirements that police give warnings prior to asking for consensual searches.

The Superior Court of Pennsylvania was not presented with, and did not consider, alternative state grounds for decision; therefore, the Pennsylvania courts' decision is premised exclusively on federal constitutional authority.

II. ALTERNATIVELY, THE PENNSYLVANIA COURTS ERRED IN FAILING TO CONSIDER THAT THE ADMISSION OF TESTIMONY SPECIFICALLY RELATING THE FACT THAT RENEE WELCH HAD OPENLY AND EXPRESSLY REFUSED HER STEPFATHER'S REQUEST TO ALLOW THE POLICE TO SEARCH HER ROOM IN THE FAMILY HOUSE FOR EVIDENCE OF ILLICIT DRUGS WAS HARMLESS ERROR.

Lastly, as an alternative argument only, the Commonwealth would argue that clearly under the circumstances of this case admission of evidence of respondent's refusal to permit a search to a third party was not prejudicial and amounted to harmless error. The proper standard for determining the harmlessness of a constitutional error is whether the appellate court is convinced beyond a reasonable doubt that the error is harmless. *United States v. Hastings,* 461 U.S. 499, 509-510, 103 S.Ct. 1974, 1980-

1981, 76 L.Ed.2d 96 (1983)("Since *Chapman,* [*infra*], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . ."); *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826-27, 17 L.Ed.2d 155, 162 (1978). An error is harmless if the appellate court finds that the error could not have contributed to the verdict: "The uncontradicted evidence of guilt must be so overwhelming, and the prejudicial effect of the improperly admitted evidence so insignificant, by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict."

Commonwealth v. Story, 476 Pa. 391, 417, 383 A.2d 155, 168 (1978).

The evidence of the refusal to permit a search was admissible to impeach respondent's claim that no drugs were present in her room which she had just left, and was relevant to showing the course of events that took place during the investigation involving a hectic family dispute that initiated the investigation. In addition, the evidence of the refusal to permit a search became relevant after respondent took the stand and interjected as a defense that the drugs were not in her room to her knowledge and inferred they were planted in her room by her brother (N.T. 2/14-17/89, pp. 256-259), because the refusal can then show that respondent's actions

of refusing to search was inconsistent with the claim that the evidence had been planted. Further, any prejudice to respondent's credibility that a refusal might give rise to is virtually nonexistent here. Three Commonwealth witnesses testified that respondent whispered to the child Francisco and left the house with the child following. Moments later, Francisco returned to the house, went to appellant's bedroom and unsuccessfully attempted to race downstairs past the police and out the front door. As the drugs were pried from the child's clutched hand, Francisco cried that respondent would "kill him," because he "screwed up." Thus, respondent's credibility and stature were in all likelihood tarnished beyond repair and a passing reference to her refusal to

a search would have little or no effect on the jury's verdict. This evidence of constructive control of the drugs is further heightened by the child's showing, at respondent's mother's insistence, that he retrieved the drugs from respondent's nightstand and purse in her room. Respondent's entire defense was that she had been framed by her brother, a defense the jury did not believe.

Consequently, the Commonwealth urges this Court to exercise its jurisdiction and accept the present appeal where it appears that the Pennsylvania appellate courts have decided the instant case of first impression not in accord with established law and in a manner inconsistent with the record in this case.

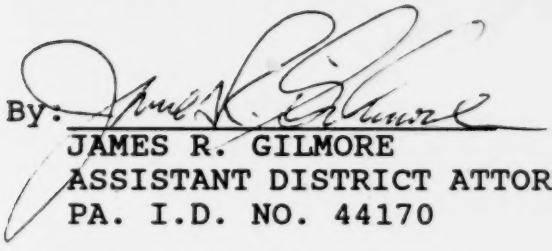
CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,

ROBERT E. COLVILLE
DISTRICT ATTORNEY

KEMAL ALEXANDER MERIÇLI
ASSISTANT DISTRICT ATTORNEY



By: _____
JAMES R. GILMORE
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 44170

Attorneys for Petitioner

APPENDIX A

DISPOSITION BY PENNSYLVANIA SUPREME COURT

On September 16, 1991, the Supreme Court of Pennsylvania entered the following Order on the Commonwealth's petition for allowance of appeal in the case of Commonwealth of Pennsylvania v. Renee Welch, A/K/A Allyson Renee Welch, at No. 98 W.D. Allocatur Docket 1991:

"September 16, 1991
Petition Denied
Per Curiam"

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

RENEE WELCH A/K/A
ALLYSON RENEE WELCH,
Appellant

No. 1153 PITTSBURGH, 1989

ORDER

AND NOW, this 23rd day of JANUARY, 1991, it is ordered as follows:

X Judgment of Sentence vacated, remanded for a new trial.

BY THE COURT

s/Eleanor R. Valecko
Deputy Prothonotary

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

RENEE WELCH A/K/A
ALLYSON RENEE WELCH,
Appellant

No. 1153 PITTSBURGH, 1989

Appeal from the Judgment of Sentence of the Court of Common Pleas, Allegheny County, Criminal Division, at No. 8810301A.

BEFORE: OLSZEWSKI, KELLY, AND BROSKY, JJ.

OPINION BY BROSKY, J. FILED: JANUARY 23, 1991

This is an appeal from a judgment of sentence imposed upon appellant after she was convicted on drug charges. Appellant raises eight issues

for our consideration including an argument that it was error to allow testimony regarding the appellant's refusal to allow a search of her room without a warrant. Because we find this issue meritorious we vacate the judgment of sentence and remand for a new trial.

Briefly stated, the facts as they were related at trial and not seriously disputed are: in response to a radio message that an individual named Renee Welch was selling drugs from a certain address, the police went to the described address and knocked on the door. At that time the police spoke with appellant's mother and stepfather about the nature of the visit. Upon learning that the police suspected their daughter of selling drugs they inquired where the

information came from. The police checked with the station and were told that there had been a call from appellant's brother, who also lived at the same address, implicating appellant. Upon hearing this appellant's stepfather called appellant's brother down from upstairs and confronted him with this information. At first the brother denied making the call but he then admitted it and went on to describe facts implicating appellant in drug selling activity. Appellant was then called downstairs and also confronted with the allegations which she denied. At that point it was suggested by someone that if the allegations were false then she ought to allow the police to inspect her room. Appellant refused indicating that she would not allow a warrantless search of

her bedroom. Additional discussions took place during which appellant's nephew came down the steps from the floor containing appellant's bedroom. Appellant's brother then chased the nephew down the steps and yelled "stop him, he's got the drugs" at which time several balloons later found to contain narcotics fell from the nephew's shirt. In response to finding these balloons the nephew was instructed by appellant's mother to take the police upstairs and show them where he got them from. Eventually a search warrant was obtained at which time additional evidence was seized. At trial, one of the officers began testifying to the events as they transpired. As the officer began testifying to appellant's comments regarding searching her room, an

objection was lodged and a sidebar discussion ensued. After hearing arguments of both counsel the officer was allowed to continue testifying at which time the appellant's refusal to allow a search absent a warrant was related.

Appellant argues that it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant. Counsel made such an argument and in addition to arguing that it was improper to have her refusal used against her, counsel also indicated that the prejudice would greatly outweigh any probative value. We are inclined to agree that it was error to allow such questioning.

It is asserted by appellant's counsel that research of that issue has revealed no cases where the specific

issue before us has been decided. Because we believe this issue is analogous in significant respects to the invocation of one's right to silence, we rely upon the cases discussing this issue.

In Commonwealth v. Haideman, 449 Pa. 367, 296 A.2d 765 (1972), our Supreme Court held that it was reversible error to admit evidence of an accused's request for counsel and silence at arrest. At the time Haideman was decided it was the more prominent view that such evidence was an impermissible impairment upon one's Fifth Amendment right against self incrimination. For instance, in Fowle v. United States, 410 F.2d 48 (9th Cir. 1969), the Ninth Circuit Court of Appeals stated,

> We simply cannot adopt an

> interpretation of the Fifth Amendment under which one exercising his right to remain silent upon and immediately after his arrest - a right which the Supreme Court has so earnestly sought to guarantee and preserve - is severely prejudiced by recourse to that cherished right. It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons, in effect: If you say anything it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.

The Seventh Circuit Court of Appeals made similar observations stating, "[t]he testimony elicited here could well have led the jury to infer guilt from defendant's refusal to make the statement. We think exercise of a constitutional privilege should not incur this penalty." United States v. Kroslack, 426 F.2d 1129, 1130-31 (7th

Cir. 1970). Although in the present case we are dealing with an assertion of a different constitutional right, the freedom from warrantless searches, we feel the same reasoning must apply to the assertion of that right.

As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches

and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions would be forced to choose between speaking after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial, thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal

be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

The Commonwealth argues that the cases regarding the Fifth Amendment right of silence should not be applied analogously to the present case as the Fourth Amendment right is not an absolute one, but only a qualified one. The argument continues asserting that one has an absolute privilege of silence but not an absolute right not to be searched. We find this argument unavailing. Although

one may not have an absolute right not to be searched the guarantee of the Fourth Amendment is no less absolute. It protects one from unreasonable searches and seizure. This protection is just as absolute as the right to remain silent, although it may require more case-by-case definition or exposition. However, even the Fifth Amendment has required much development by caselaw and has several nuances. For instance, the amendment itself does not indicate one can invoke the right at the time of arrest and at any point thereafter, rather, this premise has been developed through caselaw. Similarly, the per se unreasonableness of warrantless searches, absent certain policy exceptions, has been firmly ensconced in our constitutional caselaw history.

Although certain occasions may develop where a warrantless search is allowable, the general proposition that a warrant is necessary still prevails and, we think, is as absolute as the right to remain silent. In any event, we think this argument is very misguided. The point of significance is that one should not be penalized for asserting a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience. Thus, the actual entitlement to the right could be thought of as irrelevant to the point we are discussing. We would think that the same reasoning would apply even if the individual asserting the right had a mistaken belief that they were protected

by a constitutional provision or were extended a right or protection when, in fact, they were not. The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.

Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are

many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence. However, apparently all involved in the present case agree that a jury is likely to infer this fact from the refusal. Indeed, the Commonwealth seems to argue that this is inferable from the refusal. The district attorney states in the brief presented to this court "the inference that appellant was

hiding something was the superseding basis for relevancy grounds to show appellant's scienter." Commonwealth's brief, at page 66. As the Fifth Circuit Court of Appeals argued, "[w]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." Walker v. United States, 404 F.2d 900, 903 (5th Cir. 1968). We believe the same effect would follow from one's refusal to allow a search of one's residence or possessions. Thus, the trial court should have prevented this line of questioning when a timely objection was made.

For the above reasons we believe it was reversible error to allow the testimony regarding appellant's refusal to consent to a search in the

absence of a warrant. Therefore, we vacate the judgment of sentence and remand for a new trial.

Judgment of sentence vacated, remanded for new trial.

Jurisdiction is relinquished.

KELLY, J. Concurs in the Result.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

RENEE WELCH

NO. CC 8810301

OPINION

Donna Jo McDaniel, Judge

January 10, 1990

The defendant, Renee Welch, aka Allyson Renee Welch, was charged at CC8810301 with two (2) counts of Possession with Intent to Deliver Controlled Substances, Drugs, Device or Cosmetic, 35 P.S. §780-113(a)(30); two

(2) counts of Possession of Controlled Substance, 35 P.S. §780-113(a)(16); one (1) count of Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32; and, one (1) count of Corruption of Minor, 18 Pa. C.S. §6301.

Pre-trial motions were heard and ruled upon immediately before trial on February 15, 1989. The defendant was tried by a jury and found guilty of all charges. Post trial motions were filed and denied.

On June 22, 1989, the defendant was sentenced to consecutive terms of incarceration for 5-½ to 11 years, 1 to 3 years and 2-½ to 5 years for a total period of 9 to 19 years. The defendant has appealed the Judgment of Sentence to the Superior Court.

In her Motion for New Trial or Arrest of Judgment, the defendant alleges that (1) it was error to allow questions about the defendant's refusal to allow a search; (2) it was error to prohibit the defendant from impeaching the Commonwealth witness with a prior drug conviction; (3) it was error to admit the hearsay statements of the defendant's nephew; (4) it was error to admit evidence seized after police had been in the defendant's home for an hour; and (5) it was error to not sequester the jury.

The evidence in this case established that on September 2, 1998, Pittsburgh Police Officers were sent to 1421 Chicago Street on a call that someone was selling drugs. The name of the defendant had been given to the dispatcher.

Upon arrival, the police were greeted by the defendant's mother and stepfather who were surprised but insisted on pursuing who had made the call. The defendant's brother, Kevyn Welch, admitted that he called and stated that the defendant was selling drugs from the house.

The defendant was called downstairs and confronted by her parents. She denied everything. Her stepfather said if she didn't have drugs she would [sic] allow the police to go to her room. The defendant refused a search of her room without a warrant.

The police told the defendant that she could not return to her room before they obtained the warrant. The defendant left the house. She was

followed by her young nephew who shortly returned and went upstairs.

While the police were advising the parents, the nephew came running down the steps followed by Kevyn Welch who was yelling to stop him. The police stopped him and found that he was holding many little balloons some of which fell. The young boy said, "Oh, no, Renee's going to kill me. I screwed up."

The grandmother told the boy to show the police where he had gotten the balloons. The boy took the police to the defendant's bedroom and said he had gotten the balloons from the defendant's purse and night stand. Kevyn Welch entered the room and took empty balloons from another drawer.

The defendant was arrested. A later search of her room, with a warrant,

produced bus and plane tickets and plastic baggies and balloons with heroin and residue of heroin. The tickets were trips between Pittsburgh and New York and were in various names used by the defendant.

The total amount of the drugs involved in the case were 2.377 grams of heroin and 2.869 grams of cocaine. A Commonwealth witness, qualified as an expert, testified that the drug amounts, the packaging and the tickets all were indicia consistent with the sale of drugs.

On direct examination, the defendant testified that the drugs found in her room were not hers, and she had not seen them before. She further testified that she had been in her room immediately before the confrontation with

her parents and the police. On cross-examination, the prosecutor asked the defendant if she remembered someone suggesting to her that if she had nothing to hide, she would let the police search. The witness did remember that question but denied that she knew drugs were in her room.

The defendant claims that the above questions were an improper attack on her constitutional right to require a search warrant before consenting to a search. The cross-examination, however, was not a reference to her demand for a search warrant. It was proper impeachment of her claim that no drugs were present in the room that she had just vacated. Furthermore, the comments were made by a third-party, not the

police, and, therefore, no fourth amendment rights were implicated.

A witness may be impeached on the basis of past convictions, but only if the convictions involve crimes of dishonesty or false statements. Commonwealth v. Yost, 478 Pa. 327, 386 A.2d 956 (1978). The defendant wished to impeach the Commonwealth's witness her brother, with his prior conviction for possession of marijuana with intent to deliver. That conviction was not of a crime which involved dishonesty and was, therefore, properly excluded. The defendant, moreover, was permitted to cross-examine the witness about a different conviction in an effort to show a corrupt motive for testifying against her.

Statements made by the defendant's nephew were admitted under the excited utterance exception to hearsay. The defendant argues that this was error.

The res gestae or excited utterance exception to the hearsay rule was defined in Allen v. Mack, 345 Pa. 407, 28 A.2d 783 (1942) to be:

> "...a spontaneous declaration by a person whose mind had been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to

> exclude the likelihood of its having emanated in whole or in part from his reflective faculties." Id at 410.

The facts of this case precisely correspond with the definition of an excited utterance. Thus, the nephew's statements were properly admitted into evidence.

The defendant's argument that police need probable cause in order to remain in a home while investigating a criminal complaint is frivolous and devoid of merit. Her final argument that it was error to not sequester the jury also must fail.

Pennsylvania Rule of Criminal Procedure 1111(a) provides:

> "The trial judge may, in [his] discretion, order sequestration of

trial jurors in the interest of justice." The discretion of the trial court will not be disturbed unless there is prejudice shown. Commonwealth v. Sourbeer, ___ Pa. ___, 422 A.2d 116 (1980).

The defendant argues that there must be a presumption of prejudice since the media, at the time of trial, was focused on the death of the defendant's nephew while carrying drugs on his person.

A presumption will not suffice to show that the defendant was prejudiced. Moreover, this Court's precaution of specifically questioning the jurors each day and admonishing them each night served to protect the interest of justice and the defendant's right.

For all of these reasons, the defendant's post trial motion was denied.

By the Court

\s\ McDaniel,J.
J.

January 10, 19907

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 91-994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RENEE J. WELCH,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

SHELLEY STARK
COUNSEL OF RECORD
ALLEGHENY COUNTY OFFICE OF THE PUBLIC DEFENDER
1520 PENN LIBERTY PLAZA
PITTSBURGH, PENNSYLVANIA 15222
412-392-8403

LESTER G. NAUHAUS
PUBLIC DEFENDER OF ALLEGHENY COUNTY

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

RESPONDENT'S COUNTER STATEMENT OF THE CASE

A. FACTS OF THE INCIDENT MATERIAL TO CONSIDERATION OF THE QUESTIONS.

At approximately 8:00 p.m. on September 2, 1988, two Pittsburgh Police Officers received a radio call to investigate a "tip" that Renee Welch was selling drugs outside her residence. (T.T., 15, 34).[1] The officers knew neither the name of the informant nor the factual basis for the "tip". (T.T., 16). When they arrived at the house, the officers saw no one outside. They saw no activity of any kind. (T.T., 23, 79, 110). The Officers knocked and were admitted to the residence by Clifford and Juanita Rollerfellow, Renee Welch's stepfather and mother. (T.T., 15-16, 80).

The police told the Rollerfellows about the "tip" that Renee was selling drugs outside the house. (T.T., 15-16, 81). The Rollerfellows denied that their daughter had been selling drugs. (T.T., 16, 81). At Mr. Rollerfellow's insistence, the police called their "supervisor" to ascertain who had called the police. (T.T., 16). The officer learned that Kevyn Welch, Renee's brother, had made the call. (T.T., 16, 81-82). Kevyn had moved back into the house a few weeks earlier when he was released from prison. (T.T., 140).

---

[1] "T.T." denotes the "Jury Trial Transcript" dated February 14-17, 1989, and filed in the Certified Record. That same transcript contains the Record of the Suppression Hearing which took place immediately before the trial, T.T., 3-49. Significant portions of the transcript are reproduced and attached hereto as Appendix B1-B14.

Mr. Rollerfellow called Kevyn downstairs and asked him if he had called the police. (T.T., 16, 82). After repeated questioning by Mr. Rollerfellow, Kevyn admitted to having called the police. (T.T., 17, 83). He said that Renee was selling drugs from the house. Id. Mr. Rollerfellow then called Renee downstairs and asked her if Kevyn's allegations were true. (T.T., 17, 112). Renee denied selling drugs. Id. Although Renee denied the allegations and although the officers saw no evidence of drugs or drug related activity, they nonetheless remained in the Rollerfellow residence. (T.T., 89).

The officers asked to search the premises. (T.T., 35). They asked Renee if they could search her bedroom. (T.T., 119). The officers claimed that Mr. Rollerfellow said to Renee, "if you have nothing to hide, why not let them search your room?" (T.T., 17, 18, 88, 119). Mr. Rollerfellow denied that he ever made that statement. (T.T., 40). Irrespective of the conflicting testimony concerning whether or not Mr. Rollerfellow made that statement, the record is clear that at that point, Ms. Welch refused to allow the police to search her bedroom without a warrant. (T.T., 119).

Although the police initially respected Ms. Welch's refusal, they ultimately did search her bedroom shortly thereafter, due to subsequent events. That is, when Ms. Welch refused to allow the search, the police restrained her from returning to her bedroom. (T.T., 18). She went outside and sat on the front porch.

Approximately five minutes later her nine year old nephew, Francisco, went outside and sat with her. (T.T., 113).

Ms. Welch said to Francisco, "go in the house and see what your uncle Kevyn is doing." (T.T., 260). Francisco went upstairs where Kevyn was. (T.T., 113). Mrs. Rollerfellow also went upstairs to use the bathroom. (T.T., 239). While upstairs, Mrs. Rollerfellow saw Kevyn in Renee's bedroom. (T.T., 242). Moments later she heard Francisco and Kevyn running down the stairs. (T.T., 242). Kevyn yelled, "Get him. Get him. He got the dope!" (T.T., 120). The officers grabbed Francisco and a number of small balloons fell out from under his shirt. (T.T., 19, 92). Francisco said, "Oh no, Renee's going to kill me. I screwed up." (T.T., 19). Some of the balloons which Francisco dropped were empty and some contained drugs. (T.T., 202-204).

Francisco then took one officer upstairs to Renee's bedroom. (T.T., 20). Francisco showed the officer a purse "hanging off the nightstand" in Renee's bedroom. Id. The officer testified that Francisco claimed to have taken the drugs from that purse. Id. While in Ms. Welch's bedroom, the officer made a cursory search of the room. Id. Standing next to the nightstand, the officer surveyed the room. The officer saw no drugs or drug paraphernalia in the room. (T.T., 20-21).

Nonetheless, the police arrested Ms. Welch. (T.T., 96). The police testified, "she didn't say anything, she just came with us." Id. When the police took Ms. Welch from the house to

the station, they left the house and Ms. Welch's bedroom unsecured, unobserved, and open. When the officers returned five hours later with a search warrant, they found drugs in plain view in Ms. Welch's bedroom. (T.T., 188). The officers found drugs in plain view in places such as the nightstand where none had been seen by the officer five hours earlier. (T.T., 95, 199).

B. FACTS OF THE TRIAL ERROR AND PRESERVATION OF THE ISSUE.

Throughout Ms. Welch's trial, the prosecutor repeatedly attempted to elicit testimony regarding her refusal to allow the police to search her bedroom. The prosecutor attempted to present this evidence in the case in chief, as substantive evidence of guilt, as well as in cross-examination, to impeach the defense. (T.T., 17, 18, 85-89, 119, 147-148, 273-276; Appendix B1-B14). Some of the prosecutor's numerous attempts to introduce evidence of Ms. Welch's refusal were thwarted by defense objections which the Trial Court sustained. (T.T., 85, 86, 119). However, the Court's rulings were inconsistent and many of the prosecutor's attempts succeeded because at other times the Court overruled the defense objections. (T.T., 87-88, 147-148, 273-276).

Most notably, during cross-examination of Ms. Welch, the Court permitted the prosecutor to use Ms. Welch's refusal to consent to the search, to impeach her. The prosecutor asked Ms. Welch, "Now do you recall, as the police have testified and as Kevyn has testified, that your father or your step-father ...

suggested that if you got nothing to hide ...". (T.T., 273). Defense counsel's objection interrupted the question. The Court overruled the objection and defense counsel asked for a sidebar. (T.T., 274). At sidebar, counsel clearly stated the grounds for his objection:

> MR. SAVOR: I think this is extremely prejudicial, and even if he gets into it, someone asks if you have nothing to hide, why don't you consent to a search, the fact that she exercised her Fourth Amendment rights they're trying to use as evidence against her.

The Court again overruled the objection. The prosecutor then cross-examined Ms. Welch as follows:

> "Q. [BY THE PROSECUTOR] Ma'am do you recall anyone in the house during this confrontation suggesting to you that if you have nothing to hide, let the police look through your room?
>
> A. [BY WELCH] Something to that effect, yes.
>
> Q. You do remember that?
> A. Yes.
>
> Q. And you remember also that you didn't want them looking through your room; is that correct?
> A. Yes.
>
> Q. Now isn't that because you did know that there were drugs up there, and you didn't want the police to find them?
> A. No."

(T.T. 276; Appendix B-14).

Defense counsel preserved this issue in post verdict motions which the Trial Court denied. Ms. Welch then raised this issue,

inter alia, on direct appeal.[2] The Superior Court of Pennsylvania reversed the conviction holding, "it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant." 585 A.2d at 518, Appendix A.

Further, contrary to the Commonwealth's assertion in its Petition for a Writ of Certiorari, Superior Court did rest its decision on alternative state grounds, abuse of discretion:

> Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence.

585 A.2d at 520; Appendix A, emphasis supplied.

---

[2]Because of its ruling on this issue, Superior Court did not address the seven other errors raised in Mrs. Welch's brief.

The Commonwealth filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. That Petition raised only the question of violation of the Federal and State Constitutions and whether such an error could be harmless. That Petition did not raise or include any issue challenging Superior Court's alternative basis for its decision, the abuse of discretion by the Trial Court.

The Pennsylvania Supreme Court denied review. Therefore, the opinion at issue herein is that of the Superior Court of Pennsylvania, the intermediate appellate court, hereinafter, Superior Court.

REASONS FOR DENYING THE WRIT

A. SUPERIOR COURT'S DECISION WAS GROUNDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS; ANY DECISION RENDERED BY THIS COURT WOULD THEREFORE BE ONLY ADVISORY.

Petitioner has seriously misrepresented Superior Court's Opinion. That decision was alternatively based on adequate and independent state grounds. California v. Freeman, 488 U.S. 1311, 109 S.Ct. 854, 856 (1989). Superior Court specifically held that admission of the evidence regarding Ms. Welch's refusal to allow a search of her bedroom, constituted an abuse of discretion by the Trial Court. 585 A.2d at 520; Appendix A. That abuse of discretion necessitates a new trial "regardless of" any constitutional violation. Id. Superior Court would render the "same judgment" even if this Court "corrected its view of federal law". Michigan v. Long, 463 U.S. 1042, 103 S.Ct. 3469, 3477 (1983). Therefore, any opinion issued by this Court would be "nothing more than an advisory opinion" which is "not permitted". Freeman, 109 S. Ct. at 856; Long, 103 S.Ct. at 3477. Because of Superior Court's "plain statement" that the "decision rests on adequate and independent state grounds", this Court lacks jurisdiction to decide this case. Id.

B. THE PETITION FAILS TO PRESENT ANY GROUNDS JUSTIFYING THIS COURT'S REVIEW.

Nor has the Commonwealth asserted or met any of the established criteria for granting review. U.S. Sup. Ct. Rule 10, 28 U.S.C. The Commonwealth failed to establish "special and important reasons" which would justify issuance of a Writ of Certiorari under Rule 10. The Commonwealth has not shown that Superior Court's Opinion conflicts with "applicable decisions of this Court". Rule 10.1(c). On the contrary, Superior Court's Opinion is fully supported by the applicable decisions of this Court, [Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102 (1987), Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634 (1986) and Doyle v. Ohio, 426 U.S. 616, 96 S.Ct. 2240 (1976)], which the Commonwealth failed to distinguish.

Nor has the Commonwealth accurately presented an "important question of federal law" which this Court should settle. Rule 10.1(c). Rather, the Commonwealth has contorted the issue by misrepresenting Superior Court's Opinion. The Commonwealth claims that the Opinion would somehow require police to inform a suspect of his right to refuse a warrantless search. (Petition at 19-23, 34-35) Superior Court's Opinion does not address that issue. Ms. Welch never made that claim or raised that issue. Not only is that issue non-existent, it is irrelevant. Whether or not the police tell a suspect of his right to refuse a search is irrelevant to the issue herein. This case has nothing

whatsoever to do with warnings given by the police. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) is therefore in no way implicated or relevant to the issue herein.

Petitioner misperceives the error herein. The error which led Superior Court to reverse the conviction was not created by the words or actions of the police.[3] Rather this error occurred at trial and was caused by the Assistant District Attorney, by his exploitation of Ms. Welch's refusal to allow a search. The Trial Court allowed the prosecutor to introduce the evidence in his case in chief, to prove guilt. The Court then allowed the prosecutor to impeach Ms. Welch with her refusal to allow a search. These trial errors led Superior Court to reverse, not the failure of the police to warn Ms. Welch of her right to refuse a search.

Not only has the Commonwealth misperceived the issue herein, but the Commonwealth also misperceived this Court's holding in South Dakota v. Neville, 459 U.S. 569, 103 S.Ct. 916 (1983). Neville, like Schneckloth, is simply not relevant to the issue at hand. In Neville this Court declined to apply the rule of Doyle because the challenged evidence did not concern the Defendant's invocation of a constitutional right. Rather, Mr. Neville, suspected of drunk driving, refused the blood-alcohol test. Insofar as the taking of blood from a DUI suspect does not

---

[3]Ms. Welch did challenge the legality of the police actions and their search of her room, but in a separate issue in her appeal. Superior Court did not address that issue because of its holding that admission of the evidence at trial necessitates a new trial.

implicate the Fifth Amendment, [Schmerber v. California, 384 U.S. 757, 866 S.Ct. 1826 (1966)], no constitutional right is involved. Therefore, evidence of a refusal to take the test is admissible and constitutionally unoffensive. 103 S.Ct. at 923. In contrast, it cannot be disputed that a police search of a private bedroom implicates Fourth Amendment rights. See Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980).

In addition, the Commonwealth never proved that the police had probable cause to search the bedroom at the time of Ms. Welch's refusal. On the contrary, the parties, including the police; believed that at the time of Ms. Welch's refusal, the police could not search her bedroom unless she consented. (T.T., 17-18). Particularly given that the Commonwealth failed to prove that the Fourth Amendment allowed a search of Ms. Welch's room at the time of her refusal, Superior Court's Opinion in no way conflicts with Neville.

Nor has the Commonwealth presented any conflict among the Circuits which may warrant the grant of certiorari. On the contrary, the Commonwealth concedes that in a strikingly similar case, U.S. v. Prescott, 581 F.2d 1343 (9 Cir. 1978), the Ninth Circuit held precisely as did Superior Court herein:

> Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as "ambiguous" as the silence was held to be in United States v. Hale, 1975, 422 U.S. 171, 176, 77, 95 S.Ct. 2133, 45 L.Ed.2d 99. Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective-

> to induce the jury to infer guilt. In the case of the silence, the prosecutor can argue that if the defendant had nothing to hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone . . . she would have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. United States v. Hale, supra, 422 U.S. at 180, 95 S.Ct. 2133; Doyle v. Ohio, 1976, 426 U.S. 610, 617 fn. 8, 96 S.Ct. 2240, 49 L.Ed.2d 91; Grunewald v. United States, 1957, 353 U.S. 391, 421-24, 77 S.Ct. 963, 1 L.Ed.2d 931. It is also why the evidence is inadmissible in the case of refusal to let the officer search.
>
> 581 F.2d at 1352 emphasis supplied.

The only Circuit opinion offered by the Commonwealth to counter Prescott is U.S. v. McNatt, 931 F.2d 251 (4th Cir. 1991). However, McNatt addressed a different error and different factual circumstance than existed herein and in Prescott. In defense counsel's closing argument in McNatt, counsel claimed that the police had planted the drugs in the defendant's car. 931 F.2d at 257. In rebuttal to that factual argument, the U.S. Attorney argued that the search which the Defendant had refused to allow, would have established or refuted that serious charge. Therefore, the defense opened the door, necessitating the government's three-sentence argument in rebuttal. Id. "The government did not argue that appellant's refusal supported an inference of guilt, but only that it was inconsistent with the claim that the evidence had been planted." Id., (emphasis supplied).

In contrast, the Commonwealth did use Ms. Welch's refusal to consent, to support an inference of guilt. The Commonwealth used the evidence both in its case in chief and on cross-examination to prove Ms. Welch's guilt, not to rebut a factual claim as in McNatt. Not only was the evidence admitted for a different purpose than it was in McNatt, but the evidence concerning Ms. Welch's refusal to consent differs significantly from the substance of the evidence in McNatt. That is, the police did search Ms. Welch's room shortly after her refusal and despite her refusal. During that search the police saw no drugs in her room. Ms. Welch's defense was that her brother planted the drugs. Her defense was in fact supported by the search conducted without her consent: the police saw no drugs in her room during that initial search, yet they saw drugs in plain view when they returned five hours later. During that five hour interim, her bedroom was unsecured and open to anyone, including her brother.

Thus, not only was the error in McNatt different, but the facts of McNatt were significantly different from those herein and in Prescott. McNatt, then, conflicts neither with Prescott nor with Welch. Insofar as the Commonwealth has presented no conflict between or among the Circuits regarding the issue herein, certiorari is not warranted.

Finally, the Commonwealth not only failed to demonstrate a conflict between the Opinion herein and any applicable decision of this Court or of a Circuit, but the Commonwealth failed to cite any conflict between the Opinion of Superior Court and any

opinion of a "state court of last resort". Rule 10.1(b). On the contrary, the Commonwealth cited two state Supreme Court Opinions which held exactly as Superior Court did herein: Gracia v. State, 103 N. M. 713, 712 P.2d. 1375 (1986); Padgett v. State, 590 P.2d 432 (1979). Insofar as those Opinions completely support this decision, certiorari is not warranted.

CONCLUSION

Adequate and independent state grounds fully supported Superior Court's Opinion, rendering any opinion of this Court regarding the Fourth Amendment, advisory. Not only does this Court therefore lack jurisdiction to decide this case, but the Commonwealth has presented no grounds which would justify this Court's review. Ms. Welch asks this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

By Shelley Stark

Shelley Stark
Chief-Appellate Division
Attorney of Record

Lester G. Nauhaus
Public Defender

Attorneys for Respondent

COMMONWEALTH of Pennsylvania

v.

Renee WELCH a/k/a Allyson Renee Welch, Appellant.

Superior Court of Pennsylvania.

Submitted Sept. 17, 1990.
Filed Jan. 23, 1991.

Defendant was convicted in the Court of Common Pleas, Allegheny County, No. 8810301A, McDaniel, J., of drug charges and she appealed. The Superior Court, No. 1153 Pittsburgh 1989, Brosky, J., held that: (1) it was improper to admit evidence that defendant had refused to consent to search of her bedroom, and (2) evidence that she had refused to consent was not probative of the fact that the items which the police suspected were present were actually present.

Vacated and remanded.

Kelly, J., concurred in the result.

1. **Criminal Law** ⇐351(1)

It was error to admit evidence that defendant had refused consent to a search of her bedroom in the absence of a warrant.

2. **Criminal Law** ⇐338(7)

Evidence will be considered inadmissible if its prejudicial effect outweighs its probative value.

APPENDIX A

3. Criminal Law ⇐351(1)

Refusal to allow the police to search one's bedroom without first producing a warrant is not probative of the fact that the items which the police suspect are present are actually present.

Shelley Stark, Public Defender, Pittsburgh, for appellant.

James R. Gilmore, Asst. Dist. Atty., Pittsburgh, for Comm., appellee.

Before OLSZEWSKI, KELLY and BROSKY, JJ.

BROSKY, Judge.

This is an appeal from a judgment of sentence imposed upon appellant after she was convicted on drug charges. Appellant raises eight issues for our consideration including an argument that it was error to allow testimony regarding the appellant's refusal to allow a search of her room without a warrant. Because we find this issue meritorious we vacate the judgment of sentence and remand for a new trial.

Briefly stated, the facts as they were related at trial and not seriously disputed are: in response to a radio message that an individual named Renee Welch was selling drugs from a certain address, the police went to the described address and knocked on the door. At that time the police spoke with appellant's mother and stepfather about the nature of the visit. Upon learning that the police suspected their daughter of selling drugs they inquired where the information came from. The police checked with the station and were told that there had been a call from appellant's brother, who also lived at the same address, implicating appellant. Upon hearing this appellant's stepfather called appellant's brother down from upstairs and confronted him with this information. At first the brother denied making the call but he then admitted it and went on to describe facts implicating appellant in drug selling activity. Appellant was then called downstairs and also confronted with the allegations which she denied. At that point, it was suggested by someone that if the allegations were false then she ought to allow the police to inspect her room. Appellant refused indicating that she would not allow a warrantless search of her bedroom.

Additional discussions took place during which appellant's nephew came down the steps from the floor containing appellant's bedroom. Appellant's brother then chased the nephew down the steps and yelled "stop him, he's got the drugs" at which time several balloons later found to contain narcotics fell from the nephew's shirt. In response to finding these balloons the nephew was instructed by appellant's mother to take the police upstairs and show them where he got them from. Eventually a search warrant was obtained at which time additional evidence was seized. At trial, one of the officers began testifying to the events as they transpired. As the officer began testifying to appellant's comments regarding searching her room, an objection was lodged and a sidebar discussion ensued. After hearing arguments of both counsel the officer was allowed to continue testifying at which time the appellant's refusal to allow a search absent a warrant was related.

[1] Appellant argues that it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant. Counsel made such an argument and in addition to arguing that it was improper to have her refusal used against her, counsel also indicated that the prejudice would greatly outweigh any probative value. We are inclined to agree that it was error to allow such questioning.

It is asserted by appellant's counsel that research of this issue has revealed no cases where the specific issue before us has been decided. Because we believe this issue is analogous in significant respects to the invocation of one's right to silence, we rely upon the cases discussing this issue.

In *Commonwealth v. Haideman*, 449 Pa. 367, 296 A.2d 765 (1972), our Supreme Court held that it was reversible error to admit evidence of an accused's request for counsel and silence at arrest. At the time *Haideman* was decided it was the more

prominent view that such evidence was an impermissible impairment upon one's Fifth Amendment right against self incrimination. For instance, in *Fowle v. United States*, 410 F.2d 48 (9th Cir.1969), the Ninth Circuit Court of Appeals stated,

> We simply cannot adopt an interpretation of the Fifth Amendment under which one exercising his right to remain silent upon and immediately after his arrest—a right which the Supreme Court has so earnestly sought to guarantee and preserve—is severely prejudiced by his recourse to that cherished right. It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons, in effect: If you say anything it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.

The Seventh Circuit Court of Appeals made similar observations stating, "[t]he testimony elicited here could well have led the jury to infer guilt from defendant's refusal to make the statement. We think exercise of a constitutional privilege should not incur this penalty." *United States v. Kroslack*, 426 F.2d 1129, 1130–31 (7th Cir.1970). Although in the present case we are dealing with an assertion of a different constitutional right, the freedom from warrantless searches, we feel the same reasoning must apply to the assertion of that right.

As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions were to the contrary. With respect to the Fifth Amendment, one would be forced to choose between speaking after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial, thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

The Commonwealth argues that the cases regarding the Fifth Amendment right of silence should not be applied analogously to the present case as the Fourth Amendment right is not an absolute one, but only a qualified one. The argument continues asserting that one has an absolute privilege of silence but not an absolute right not to be searched. We find this argument unavailing. Although one may not have an absolute right not to be searched the guarantee of the Fourth Amendment is no less absolute. It protects one from unreasonable searches and seizure. This protection is just as absolute as the right to remain silent, although it may require more case-by-case definition or exposition. However, even the Fifth Amendment has required much development by caselaw and has several nuances. For instance, the amendment itself does not indicate one can invoke the right at the time of arrest and at any point thereafter, rather, this premise has been developed through caselaw. Similarly, the per se unreasonableness of warrantless searches, absent certain policy exceptions, has been firmly ensconced in our constitutional caselaw history.

Although certain occasions may develop where a warrantless search is allowable, the general proposition that a warrant is necessary still prevails and, we think, is as absolute as the right to remain silent. In any event, we think this argument is very misguided. The point of significance is that one should not be penalized for *asserting* a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience. Thus, the actual entitlement to the right could be thought of as irrelevant to the point we are discussing. We would think that the same reasoning would apply even if the individual asserting the right had a mistaken belief that they were protected by a constitutional provision or were extended a right or protection when, in fact, they were not. The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.

[2, 3] Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence. However, apparently all involved in the present case agree that a jury is likely to infer this fact from the refusal. Indeed, the Commonwealth seems to argue that this is inferable from

usal. The district attorney states in ef presented to this court "the infer- hat appellant was hiding something ne superseding basis for relevancy ls to show appellant's scienter." onwealth's brief, at page 66. As the Circuit Court of Appeals argued, would be naive if we failed to recog- at most laymen view an assertion of th Amendment privilege as a badge t." *Walker v. United States*, 404 00, 903 (5th Cir.1968). We believe me effect would follow from one's to allow a search of one's residence ssessions. Thus, the trial court have prevented this line of question- nen a timely objection was made.

the above reasons we believe it was ble error to allow the testimony re- g appellant's refusal to consent to a in the absence of a warrant. There- e vacate the judgment of sentence mand for a new trial.

ment of sentence vacated, remanded new trial. Jurisdiction is relin- d.

LY, J., concurs in the result.

Q All right. What happened after that?

A I believe the Rollerfellows called Renee downstairs then and asked her if this was true, and she denied it; and Mr. Rollerfellow said, "Well, if it's false, then let these policemen go upstairs and check your room. Let them go up and look because Kevyn said she has stuff up there right now. You can go up there and look," and Renee said, "No. If you don't have a search warrant, you can't go up to my room."

And at that point we didn't want to go up

without a search warrant since she said that she didn't want us to go up there, but Mr. Rollerfellow said to her, "Well, then you must have something to hide if you will not let these policemen go upstairs. If you have nothing to hide, you don't have to be worried about them going up there."

Renee wanted to go back up to her room, and my partner said, "No. You can't go up there. You're going to have to stay out of the room until we get a search warrant," and so she left the house.

The nephew, Cisco they called him, was sitting on the love seat the whole time watching TV while we were standing there listening to this argument going on between the family --

Q When you say Cisco, do you know Cisco's full name?

A Francisco Martinez.

Q Go ahead.

A And he got up while we were standing there, and he went out of the front door right after Renee; and shortly afterwards he came back in the house, and he went upstairs, and in the meantime we were speaking to the Rollerfellows about what we could possibly do for them and what would happen -- you know, where we could recommend that they get some help and that they could talk to our plainclothesmen and the drug detectives and see if this

anything more to this; and I guess it's that kind of feeling that you know that there may be some truth to it but you don't really want to admit that there is any truth to it, and Kevyn said, "Well, ask her. Just ask her. Call her down here. Ask her. Ask her what she's doing."

MR. SAVOR: I'm going to object to the hearsay nature of this testimony.

THE COURT: I'll sustain the objection.

Q Was Renee called down at that point?

A Yes. They called her downstairs, and she came from upstairs where the bedrooms are down to the first floor where we were all having this discussion; and Mr. Rollerfellow said --

MR. SAVOR: I'm going to object again to the hearsay nature, Your Honor.

THE COURT: I'll sustain the objection.

Q Can you tell us did anyone present confront Renee with the allegations against her? And I'm only trying to get at what, if anything, her reaction was to being confronted with those allegations.

A Yes. When they asked her if she was selling drugs, if this was true --

MR. SAVOR: Again, Your Honor, all these witnesses are here and available to testify. She is certainly not the person to relate anything they

said.

MR. FITZSIMMONS: Your Honor, if the Defendant gave a reaction to what was being stated to her at that point either orally or nonverbally, I think that is evidence that can be used against her, and that's all I'm trying to elicit. I'm not offering statements made by others for the truth of those matters, but only to give context to the reaction or statement --

THE COURT: Okay. I'll allow the statement on that limited basis, Mr. Fitzsimmons.

MR. FITZSIMMONS: Thank you, Your Honor.

A She looked at her brother and her parents and just acted like she wasn't really involved, and her stepfather said, "Well, if it's not true" --

MR. SAVOR: I object again to this, Your Honor. I mean a minute ago we were into the -- any admissions the Defendant made. Now we're talking about statements that the grandparent might have made or stepfather. He's certainly here. He's got his ability to testify.

THE COURT: I'll sustain the objection.

Q Let me ask you this, ma'am. Did anyone present there suggest to Renee that she permit inspection of her room to disprove these allegations?

A Yes, they did.
Q And what was her reaction to that?
A She said no, that we couldn't get to her room --

MR. SAVOR: I object. Excuse me, Your Honor. Can I have a sidebar for a moment?

- - -

(Sidebar conference as follows:)

MR. SAVOR: Your Honor, she's going to testify that the Defendant refused to allow a search without a warrant. That is certainly prejudicial for the limited use here.

Someone is going to assert their right not to be searched without a warrant, and they have to have it used against them in court? That is extremely prejudicial. I mean how can one assert their rights if a police officer is going to be allowed to come in and say, no, she wouldn't let us search without a warrant and the jury has to hear that?

MR. FITZSIMMONS: Your Honor, I don't believe it's prohibited. Obviously the defense can cross-examine on this point. The Defendant if she chooses can explain her actions at that point. I believe it's permissible --

MR. SAVOR: How can anyone assert their Fourth and Fifth Amendment rights if they're going to be

brought back and tell the jury --

THE COURT: It's clear the police cannot make any reference to her choice to remain silent, Fifth Amendment; but I don't know of any case law that says -- that apply to the Fourth Amendment rights. I will allow the statement.

MR. SAVOR: Excuse me for one second. I don't see how it's relevant that she denied letting them search. All they're asking is would they let you search the place? I mean it's very prejudicial, and there's no probative weight there whatsoever.

MR. FITZSIMMONS: It bears upon her intent, her knowledge. Absolutely.

THE COURT: I'll allow the statement. Your objections are on the record.

- - -

(In open court, jury present:)

BY MR. FITZSIMMONS:

Q Ma'am, the last question, can you answer that and complete your response?

A Could you repeat the question?

Q Yes. I believe you had related that someone suggested that to refute these allegations, she should consider allowing you officers to search her bedroom, and I asked you what her response or reaction was to that suggestion.

A She was against it. She --
Q Now -- okay. Go ahead. If you didn't complete your answer, go ahead.
A She looked at us and said, "No. I don't have to. If you don't have a search warrant, you can't go up to my room."
Q At that point after she said that, did you continue to remain there and to investigate the allegations that had been made?
A At that point we really didn't even have time to make a decision because her stepfather continued on, pressing us to do something. I think he felt like his whole house was in turmoil --

MR. SAVOR: I object to what she might think the stepfather was feeling.

THE COURT: I'll sustain the objection.

A Anyway, he asked us what he could do, and he wanted to know where they could go from there. If Renee had a problem or if there was some trouble, he didn't want this going on in his house.

He told us that his wife was very visible in the community and involved in community activities, and it would be terrible for their daughter to be selling drugs right under their very noses, and he wanted something done about it. He wanted to know what we could do about it.

We spoke with our plainclothesman on the radio.

until we get this thing straightened out."

So she sat on the couch, and Mr. Rollerfellow was very insistent that he wanted to get to the bottom of this. He wanted to find out what was going on in his home. "This is my home. I want to know what's going on," and very insistent that we and everybody -- "Let's get this thing straightened out."

So we were kind of monitoring everything at that time, finding out -- we're trying to find out what was going on and see if these allegations were true or not, and this went on for quite a while, and then Renee says -- we asked her if we could go up and check her room out after Mr. Rollerfellow said "Well, if you have nothing to hide, why don't you go up there" --

MR. SAVOR: Your Honor, I object to the hearsay.

THE COURT: I'll sustain the objection.

Q Were you permitted at that time to go up there, sir?

A No.

Q Did Renee remain at the house after that point?

A No. She started to walk out the door. I was standing right at the door, and the nephew, Francisco Martinez, was sitting on a little -- like a little couch. He was watching TV, kind of completely oblivious to everything that was going on. She kind of bent over and said something to him -- I don't know what it was -- and walked

brought them down and showed them to the officers and Clifford, and then the officers told them that they could possibly be used for, you know, packaging drugs of various --

Q Where did you get those balloons from, sir?

A From her room, off her dresser.

Q From whose room?

A Renee's room.

Q What happened after that point, sir?

A After that point -- well, during this point sometime Renee had come into the house from outside, and I said, "There she is. There she is, right there. Ask her, right," and the police went and confronted Renee because she -- and then she denied it, and then she attempted to go up the stairs, and they told her, "No. You can't go upstairs."

So she went and sat down in a chair in the living room. Me and her were having words back and forth throughout the whole thing while the police were talking to my parents. She was saying, "I didn't know you hated me this much. You dog. You dog. I don't know why you hate me this much. I didn't think you hated me this much."

The police were deciding on whether they should call another officer or someone to see about getting a search warrant for her room because Renee had denied them

access to her room, and then they were deciding on the legality of whether my mother and Clifford could give them permission to search her room being that the house was in -- the lease was in their name; and so we just basically waited, you know, for a period of time.

Renee had got up to leave, and at some point in time Cisco had come in the house I guess out of curiosity of what was going on, and he was sitting on the love seat; and as Renee got up to leave, she bent over, said something to him, and she left out. About five minutes later Cisco left out of the house.

My mother walked upstairs. Cisco came in the house while my mother was walking upstairs, and he went upstairs. I went upstairs to talk to him because, you know, to try and explain to him what was going on --

Q To talk to Francisco?

A Yeah, and while I was in my room I noticed that he wasn't in his room -- you know, in the room, because he usually, you know, would go into the room and sit around and watch television --

Q This is your room you're talking about?

A Yeah, the room that I stay in.

Q Did he have his own space, so to speak?

A Yes. He had his own space downstairs.

Q On the first floor?

bed (indicating). My door is right here (indicating). So if it was my nightstand, I would have to look like back this way (indicating).

Q So there may have been drugs sitting there or maybe they weren't?

A They may have and maybe not.

Q They certainly weren't yours?

A No.

Q You go downstairs, and you're confronted with this allegation; is that right?

A Correct.

Q Now, when you're standing downstairs, did you have any reason to believe that there was any drugs up in your bedroom?

A After I was confronted, after I was confronted with the question and they had said that Kevyn had called and said that there was drugs up in there, I didn't know. I had no idea actually.

Q I'm saying did you have any knowledge or any belief that there was any drugs up in your bedroom when you were confronted with that allegation?

A No.

Q Now, do you recall as the police have testified and as Kevyn has testified that your father or your stepfather -- I'm sorry -- suggested that if you got nothing to hide --

MR. SAVOR: Excuse me, Your Honor, I think we're assuming facts not in evidence. There's been no testimony presented to this; and I believe what Mr. Fitzsimmons is referring to --

THE COURT: I'll overrule the objection. You may finish --

MR. SAVOR: Can we have a sidebar, Your Honor?

- - -

(Sidebar conference as follows:)

MR. SAVOR: I think what you were going to ask was if Mr. Rollerfellow said, "Well, if you got nothing to hide, let them go up and look"; right?

MR. FITZSIMMONS: You got it. Of course, if you had waited until I finished, you would know.

MR. SAVOR: I understand that, but the question was prejudicial. Officer Degler testified to that at the suppression hearing. She never testified to that during this trial. He never asked her about that. She never said anything about what Mr. Rollerfellow said. After I objected to that sort of thing being hearsay, he didn't pursue that line of questioning, and I'm positive on the matter. It's not in the transcript.

THE COURT: I don't remember. I honestly don't remember whether -- I know that testimony has been

entered, but I can't state if --

MR. FITZSIMMONS: Well, I know it came out of the mouth of Kevyn Welch.

MR. SAVOR: He never said that either. Nothing to that effect has ever been said after the suppression hearing; and even if it was, I guarantee you if we look through, it's not in there. Even if it was --

MR. FITZSIMMONS: But it's there. I know it's there. Kevyn said that just this morning.

THE COURT: Would you like to review the testimony?

MR. SAVOR: The only problem I have with that --

THE COURT: Can we go off the record?

(A sidebar discussion was held off the record.)

MR. FITZSIMMONS: At this point all I want to ask is if she remembers being -- that being suggested by Mr. Rollerfellow. I mean if she does, then obviously there is that follow-up question. If she doesn't, then that's the end of the inquiry.

MR. SAVOR: I think this is extremely prejudicial, and even if he gets into it, someone asks if you have nothing to hide, why don't you consent to a search, the fact that she exercised her Fourth Amendment rights they're trying to use as

evidence against her. Now, I think it's extremely prejudicial, and I wish I had a case on hand to cite. I am sure there are some.

THE COURT: Your objection will be noted, Mr. Savor.

- - -

(In open court, jury present:)

BY MR. FITZSIMMONS:

Q Ma'am, do you recall anyone in the house during this confrontation suggesting to you that if you have nothing to hide, let the police look through your room?

A Something to that effect, yes.

Q You do remember that?

A Yes.

Q And you remember also that you didn't want them looking through your room; is that correct?

A Yes.

Q Now, isn't that because you did know that there were drugs up there, and you didn't want the police to find them?

A No.

Q Shortly thereafter you left and you went outside; is that correct?

A Yes.

Q Where were you going?

A I just went outside to sit down on the steps, sit down on

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA Petitioner	:	
v.	:	No. 91-994
RENEE J. WELCH Respondent	:	

PROOF OF SERVICE

I, Shelley Stark, Chief-Appellate Counsel, of the Office of the Public Defender do hereby certify that a true and correct copy of the within Brief has been served upon opposing counsel, Kemal A. Mericli (412-355-4377).

Respectfully submitted,

Lester G. Nauhaus
Public Defender

By Shelley Stark
Shelley Stark
Chief-Appellate Counsel
(412-392-8403)

Date: February 14, 1992

NO. 91-994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

V.

RENEE J. WELCH

Respondent,

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ROBERT E. COLVILLE
District Attorney

KEMAL ALEXANDER MERIÇLI
Assistant District Attorney

JAMES R. GILMORE
Assistant District Attorney
Counsel of Record

OFFICE OF THE DISTRICT ATTORNEY
401 Allegheny County Courthouse
Pittsburgh, PA 15219
(412) 355-4377

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE MATTER

This Reply Brief is in response to the Brief in Opposition filed by respondent on the Commonwealth's Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, pursuant to Rule 15.6.

REPLY ARGUMENT

Counsel for respondent is to be commended for her skill in the close reading of an opinion. Upon reflection and in hindsight, it cannot be denied that Superior Court made a deliberate effort to ground its decision in this case upon an independent and adequate state ground. Regretfully, the Commonwealth should have undertaken an equally specific analysis in order to have presented the case more fully in order to have anticipated this

counter-argument that valid state grounds for decision nevertheless exist. The Commonwealth regrets its failure to have realized this without the direction provided by respondent's reply. Nevertheless, when the matter is carefully considered the Commonwealth suggests that this is an excusable failing. A pertinent examination of Superior Court's opinion reveals that its effort to craft an independent and adequate state ground for the decision, in distinction to the federal constitutional violation succeeds only at the most superficial level and by necessary corollary, fails in substance.

The conception that the admission of the evidence was alternatively an abuse of discretion has no real independent significance. As an

alternative ground for reversal, separate and distinct from the alleged federal constitutional violation, it is more apparent than real. The position is fundamentally so threadbare that Superior Court's opinion, in this respect ultimately fails to maintain the fiction that it is anything other than more of the same in terms of its finding of a federal constitutional violation. Essentially, the supposed lack of probative worth of the evidence depends fundamentally upon the same concept that admission of the evidence is in derogation of respondent's Fourth Amendment constitutional protections which should be equivalent to those provided under the Fifth Amendment -- as the analogy by Superior Court to the treatment of the assertion of Fifth

Amendment privilege as discussed in *Walker v. United States,* 404 F.2d 900 (5th Cir. 1968), makes clear. *Commonwealth v. Welch,* 401 Pa.Super. 393, 585 A.2d 517, 520 (1991). *Plainly this is the sole source, and sum and substance, of any cognizable prejudice in the opinion of Superior Court.* In reality, Superior Court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . ." *California v. Freeman,* 488 U.S. 1311, 109 S.Ct. 854, 856 (1989)(quoting *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977)). Accordingly, this Court has jurisdiction and should decide the federal issue because the state court discussion of the

evidentiary matter is "interwoven with the federal law." *Michigan v. Long,* 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1202 (1983).[1]

---

[1] This is a fine example of "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other . . ." *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 u.S. 157, 164, 37 S.Ct. 318, 321, 61 L.Ed. 644 (1917), as quoted in *Michigan v. Long, supra,* at 1038, n. 4, 103 S.Ct. at 3475, n. 4. Without the ostensible federal constitutional violation to supply the prejudice, it just doesn't work. This Honorable Court has communicated the following precept as dispositive in such circumstances:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will

(continued...)

In attempting to evolve an independent and adequate state ground for its decision based upon the lack of

---

[1](...continued)

> accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administra-tion will be greatly improved.

Michigan v. Long, supra, at 1040-41, 103 S.Ct. at 3476. Applicable to this case, it compels a conclusion that this Honorable Court has jurisdiction to hear this case.

probative worth of the evidence in question, Superior Court faced an intractable problem. It defies common logic to consider that a refusal to consent to a request by the police to search one's home cannot serve to prove, more or less, that one feared that the police if permitted to make a search might discover incriminating evidence. Although subject to an evaluation of its weight in any particular case, it cannot be reasonably offered that such a refusal could have no conceivable
bearing on an individual's desire to prevent the police from finding incriminating evidence that might be located in the home. Thus, Superior Court faced a dilemma. The

Commonwealth suggests that Superior Court ultimately failed to solve this problem in a manner that affords solace to respondent's position. Superior Court essentially was compelled by its reasoning to return to the concept that the evidence should be inadmissible because to admit it would denigrate the exercise of respondent's federal constitutional rights under the Fourth Amendment, drawing an analogy to the prohibition against admission of evidence commenting on one's exercise of the Fifth Amendment. There is nothing independent in the substance of this argument.

Welch, supra, at ___, 585 A.2d at 520. In the end it relates back to the concept that the admission of the evidence violates the Fourth Amendment. This is where the ostensible prejudice justifying

reversible error is mooted. It is nothing more than an example of tautological reasoning. Furthermore, this Court is not constrained to take such things at their asserted face value but may go to the heart of matters. The Commonwealth submits that doing so in this case yields the conclusion that the only rationale Superior Court actually has for its rule in this case is that the Fourth Amendment to the United States Constitution was violated. Therefore, this Court has jurisdiction to decide the federal issue.

CONCLUSION

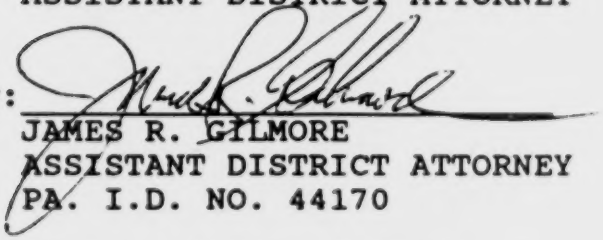
WHEREFORE, the Commonwealth respectfully requests this Court grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT E. COLVILLE
DISTRICT ATTORNEY

CLAIRE C. CAPRISTO
DEPUTY DISTRICT ATTORNEY

KEMAL ALEXANDER MERICLI
ASSISTANT DISTRICT ATTORNEY

By: 

JAMES R. GILMORE
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 44170

Counsel for Petitioner